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5-3100-7392-2;
5-3100-7483-2;
5-3100-7492-2;
5-3100-7493-2;
5-3100-7494-2;
5-3100-7655-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF VETERANS AFFAIRS

In the Matter of Certain Petitions for Relief under the Veterans Preference Act: Donald R. Tonnell, Scott R. Salzman, Gary L. Johnson, Thomas M. Vescio, Paul C. Eskew and Rocky P. Reynolds,

Petitioners,

VS.

City of Minneapolis,

Respondent.

ORDER ON NOTION FOR SUMMARY DISPOSITION

By Motion dated March 18, 1993, the City of Minneapolis seeks adverse summary disposition of all of Petitioners' claims for relief under the Veterans Preference Act. The Motion asserts that the positions of the Petitioners with the City of Minneapolis are not subject to the protections of the Veterans Preference Act and, in the alternative, that the requests for relief under the Act by the Employees are untimely.

Appearances: Dennis A. Goldberg, Employer's representative, Goldberg, Swanson & Paulsen, Affiliated Management Consultants in Labor and Employee Relations, 415 Thresher Square, 700 South Third Street, Minneapolis, Minnesota 55415, appeared on behalf of the Employer, City of Minneapolis; and Gayle Gaumer, Wilson Law Firm, Suite 220, 4933 France Avenue South, Edina, Minnesota 55410, appeared on behalf of the petitioning Employees.

At the request of the representatives of the parties, this matter was continued to accommodate pending settlement discussions. By letter received by the Administrative Law Judge on October 7, 1993, notice was provided that efforts at settlement had been unsuccessful and that a decision would be required on the Motion. The record on the Motion, therefore, closed on October 7, 1993.

Based upon the Motion to Dismiss, the written submissions of the representatives of the parties and on all the files and records herein, the Administrative Law Judge makes the following:

ORDER

The Motion of the Employer, City of Minneapolis, to dismiss the Petitioners' requests for relief under the Veterans Preference Act on the grounds that the Act does not apply to the positions of the Petitioners and that, in the alternative, they have waived any relief otherwise available by failure to file timely requests for relief is in all respects DENIED.

Dated this day of November, 1993.

HOWARD L. KAIBEL JR.
Administrative Law Judge

MEMORANDUM

The Employer, City of Minneapolis, has moved for summary disposition of Petitioners' claims for relief under the Veterans Preference Act. The request for summary disposition is analogous to a motion for summary judgment under Rule 56.02 of the Minnesota Rules of Civil Procedure. The same standards apply. Minn. Rule pt. 1400.5500 K (1991). Summary disposition of a claim is appropriate when there is no genuine issue as to any material fact and one party is entitled to a favorable decision as a matter of law. Minnesota Rules of Civil Procedure, Rule 56.03. A material fact is one which is substantial and will affect the result or outcome of the proceeding, depending upon the determination of that fact. Highland Chateau v. Minnesota Department of Public Welfare, 356 N.W.2d 804 (Minn. App. 1984). In considering the Motion for Summary Disposition, the evidence must be viewed in the light most favorable to the nonmoving party. Grandahl v. Bulluck, 318 N.W.2d 240 (Minn. 1982); Nord Y. Herreid, 305 N.W.2d 337 (Minn. 1981); American Druggists Insurance v. Thompson Lumber Co., 349 N.W.2d 569 (Minn. 1989).

In order to obtain summary disposition, the moving party carries the

burden to establish there is no genuine issue of material fact. see e.g. Thiele v. Stich, 425 N.W.2d 580, 583 (Minn. 1988). The initial burden is on the moving party to establish a prima facie case for the absence of material facts at issue. Thiele v. Stich, 425 N.W.2d 580, 583 (Minn. 1988). Once the moving party has established a prima facie case, the burden shifts to the nonmoving party. Minnesota Mutual Fire & Casualty Company v. Retrum, 456 N.W.2d 719, 723 (Minn. App. 1990). When the movant also bears the burden of persuasion on the merits at trial, its burden on summary disposition is to present "credible evidence" that would entitle it to a directed verdict if not controverted at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 2557, 91 L.Ed.2d 265 (1986) (dissenting opinion restating majority

position); Thiele, 425 N.W.2d at 583, n. 1. When the nonmoving party bears the burden of persuasion at trial, however, the moving party's burden can be met by informing the trial court of the basis for its motion and merely identifying those portions of the pleadings, depositions. answers to interrogatories, admissions or affidavits which it believes demonstrate the absence of a genuine issue of material fact. The moving party in such a case
is not required to support its motion with affidavits or other similar material negating the opponent's claim and can meet its burden by merely pointing out "that there is an absence of evidence to support the nonmoving party's case." Celotex Corp. 106 S.Ct. at 2553, 2554. In Celotex. the Court stated:

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all the other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof. "[T]h[e] standard (for granting summary judgment] mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a) . . ." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 259, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986).

106 S.Ct. at 2511. Accord Carlisle v. City of Minneapolis, 437 N.W.2d 712
(Minn. App. 1989).

Summary disposition may be entered against a party who has the burden of
proof at trial if It fails to make a "sufficient showing" of the existence of
an essential element of its case after adequate time to complete discovery.
Carlisle, 437 N.W.2d at 715. To meet this burden of producing "sufficient"
evidence, the nonmoving party with the burden of proof at trial must offer
"significant probative evidence" tending to support its claims. This burden
is not met by a mere showing that there is some "metaphysical doubt" as to the
material facts. Id. However, the nonmoving party is given the benefit of the
most favorable view of the evidence. Concord Co-op v. Security State Bank of
Claremont, 432 N.W.2d 195, 197 (Minn. App. 1988). Also, all doubts and

inferences must be resolved against the moving party. Dollander v. Rochester
State Hospital, 362 N.W.2d 386, 389 (Minn. App. 1985).

The Employer, City of Minneapolis, argues that the Petitioners are seasonal employees who are not entitled to the protections of the Veterans
Preference Act, relying primarily on Crnkovich v. Independent School District
No. 701, Hibbing, 273 Minn. 518, 142 N.W.2d 284 (1966), State ex rel Lund v. City of Bemidji , 209 Mi nn. 91, 195 N. W. 514 (1941), State ex rel Castel v-
Village of Chisholm, 173 Minn. 485, 217 N.W. 681 (1928), and Anderson v. City

of St. Paul, 241 N.W.2d 86 (Minn. 1976). The City also argues that their requests for relief were not timely filed. in that it gave the Employees appropriate notice of any veterans preference rights, including the ability to request a hearing and they did not request a hearing within sixty days of receiving notice of the annual termination of their seasonal employment. The City attempts to distinguish Young v. City Qf Duluth, 386 N.W.2d 732 (Minn. 1986), arguing that the notice provided was the substantive equivalent and had the same practical effect as the notice required by the court in that case.

The Employees argue that the Crnkovich line of cases do not apply to their situation. They request that the Commissioner of Veterans Affairs view this case as a reduction in force case rather than as the termination of a position of fixed duration. The Employees also argue that they have not waived their veterans preference rights because the City did not give notice of their veterans preference rights when it failed to assign them work, initially, for the winter season. Relying on Young v. City of Duluth. supra, the Employees argue that the lack of appropriate notice tolls the running of the sixty-day period for requesting the relief afforded by the Veterans Preference Act.

The facts in this case are not open to serious dispute. The Employees are permanent seasonal laborers for the City of Minneapolis. They have served in this capacity for a significant number of years. Laborers within the permanent seasonal classification work from approximately April to November of each calendar year. The City gives an examination to establish an eligible list for the hiring of such permanent seasonal laborers. All of the employees are, therefore, permanent employees of the City of Minneapolis in the classification known as "Construction & Maintenance Laborer". On October 2, 1992, prior to the end of the construction season, each Employee received a notice entitled, "Laborer Winter Work List". That notice asked each laborer to indicate whether the laborer wished to continue working on December 1, 1992, for the winter work season. The notice to the Employees states, "[A]ll

winter positions will be filled according to seniority with consideration given to department preference". The notice also states that the Employees "must remain available for recall by the City according to reverse seniority in order to fulfill any additional labor demands". Individuals who do not satisfy that requirement of the City are informed that their unavailability will be reported to the government for unemployment compensation purposes. In the past, assignment to winter work had been strictly on the basis of seniority. The Laborer Winter Work List issued on October 2, 1992, stated as an exception to seniority the following "except that during the period from the time of the first lay-offs to December 1, 1992, the senior employee who is available at the time of the need for an employee will be assigned and keep this assignment until December 1, 1992." Apparently, at some point in the winter work season, after experiencing a lay-off for a period of time the Employees all received winter assignments.

At the end of November, the City issued a "Laborers Winter Work List 1992-1993". The work list listed laborers in order of seniority who had requested work assignments and against the names of those to continue working, their work assignments. Petitioners were ranked, in order of labor seniority, as numbers 17, 18, 19, 28, 29 and 65, respectively, on the work list. They did not initially receive work assignments and became unemployed for some period of time. Approximately one-half of the laborers that requested a

winter assignment and did not become unemployed for any period of time had less seniority than the Petitioners. The notice issued to laborers on October 2. 1992, contained a statement that if the laborer believed he was being laid off for any reason other than the end of the employment season, he could request a hearing under the Veterans Preference Act. When the work list was issued at the end of November, 1992, it contained no statement of veterans preference rights or the right to request a hearing if the laborer was not selected for winter work.

Approximately one-third of the persons who are within the classification of Construction & Maintenance Laborer were placed on the winter work list for 1992 and 1993 and, thus, had permanent year-around full-time employment with the City. This follows the past experience of the City for a number of years in which a significant number of persons within the Construction & Maintenance Laborer classification are selected for winter employment. There Is no evidence in the record and no contention by the City that it selects winter laborers from any classification other than that of Construction & Maintenance Laborer. Thus, all of the City's winter laborer needs are satisfied from the pool of Construction & Maintenance Laborers who have a permanent status with the City as "seasonal" employees.

The City does not claim that any of the Petitioners are not veterans or that they would not otherwise be entitled to the protections of the Veterans Preference Act, if it applied to their positions and they made a timely request for relief.

The caselaw in Minnesota and in other foreign jurisdictions is clear that a temporary non-civil service employee, that is, one hired for a limited period of time or for a specific task, cannot extend his or her tenure after the completion of that task or the passage of the time for which the individual was hired by claiming veterans preference rights. Crnkovich v. Independent School District No. 701, Hibbing, 273 Minn. 518, 142 N.W.2d 284 (1966); Lund v. City of Bemidji, 209 Minn. 91, 94, 295 N.W. 514, 516 (1940); State ex re] Castel v. Village of Chisholm, 173 Minn. 485, 490, 217 N.W. 681, 682 (1928); Giannone v. Carlin, 120 A.2d 449 (N.J. 1956); Bentley v. Jeacock, 14 N.Y.S. 2d 366, 369 (S. Ct., Erie Cnty 1939); Annotation, Public Employee-Veteran-Discharge, 58 ALR 2d 960, 12A. In Crnkovich, supra, the court held that a stop-gap carpenter who was hired by the City without

competitive examination to provide some "sporadic, intermittent and temporary" services while it pursued regular selection of a permanent replacement for a retiree, did not have any vested right under the Veterans Preference Act to continue in that position as the permanent replacement. In Anderson v. City of St. Paul, 241 N.W.2d 86 (Minn. 1976), the Minnesota court subsequently explained and specifically narrowed the Crnkovich exclusion to situation where the employee "had agreed to temporary status". 241 N.W.2d at 86. The court emphasized in Anderson, that the substance of the employment relationship must be scrutinized to avoid the unreasonable expansion of the Crnkovich exception to inappropriate circumstances by looking beyond the label the City attaches to a particular position. The Minnesota court has consistently recognized that the substance of the employment relationship will be considered rather than the specific characterization of the employee's position adopted by the City.

In Anderson the court rejected St. Paul's attempt to characterize 23 truck drivers as "temporary" employees. though the trial court found that they had been duly appointed and reappointed to fixed term "emergency" positions of only 5 days duration. The Supreme Court held that they should legally be treated as permanent employees, noting that the city had repeatedly hired and rehired the drivers for those positions every 5 days, so that they had been employed continuously for 10 years. Similarly, in Castel v. Chisholm, supra, the court held that a fireman was entitled to Preference Act protections even though his one year fixed term position had expired and someone else was hired to fill the position for the next year, noting that he had been continuously reappointed to the position annually for 5 years. Likewise, in Lund v. Bemidji supra, the court treated a sewer worker who had been continuously employed for 5 years as a permanent employee of the city even though he had reapplied and had been reappointed annually for a position characterized by the city as a fixed term, one year job.

While the City characterizes Crnkovich and other cases as holding that no veterans rights attach to a temporary employee, that is an over-statement of the exception. What the cases hold, as recognized by Justice Rogosheski in his concurring opinion in Crnkovich, supra, is that a person hired for a fixed term or a specific, limited task is not "discharged" when that task is completed. Rather, the job terminates of its own force and the veteran cannot extend his position into permanent status by application of the Veterans Preference Act, contrary to the understanding of the parties at the time of hiring. 142 N.W.2d at 288. Prior to the termination of the job, the individual would enjoy veterans preference rights.

In looking at the entire employment relationship in which the Petitioners are involved, it is clear that they are legally entitled to veterans preference in their selection for placement on the winter work list. It would be an error for the Commissioner to accept the characterization of the jobs as being purely seasonal and terminating at the end of the construction season in November of each year. It is on the contrary evident, from all of the recent past history of the City that a significant number of persons within the Construction & Maintenance Laborer classification will be selected for continuous work year-round. In 1992, approximately one-third of all such laborers received uninterrupted full-time employment. Moreover, persons selected for winter employment are always selected from the pool of

Construction & Maintenance Laborer workers. The need for such full-time laborer help is not unusual or sporadic. It is a predictable and regular occurrence. The formal status of winter construction work is also recognized by the notice that the employees receive at the termination of the regular construction season. They can be required to accept winter work by the City to retain their classification as Construction & Maintenance Laborers. The notice specifically states that they must be available for winter work in the employment of the City in the inverse order of their seniority. As pointed out in the brief of Petitioner, there are also a number of official recognitions by the City that the appointment of persons to the winter work force should be made from the Construction & Maintenance Laborer pool and would be in the order of seniority.

The factual situation presented in this case could be analyzed, essentially, as either a reduction in work force case or as a cessation of the seasonal position with a preference given to veterans in the selection for

placement on the winter work list. In either event the result is the same.
the Veterans Preference Act applies to give the employees the rights stated by
the court in State ex rel Boyd v. Matson, 193 N.W. 30, 32 (Minn. 1923):

> In the present case, the relator appointed in 1918 had a preference right under the civil service laws superior to the preference right of the soldiers who applied for employment in 1921; that is, he could not be removed to make a place for one of them. Their preference right at the time they applied was merely a right to be preferred over other applicants in appointments to be made then or thereafter. The statute undoubtedly gives them a right to be retained in service in preference to non-soldiers appointed at the same time, or who do not take precedence over them under the civil service rules; but we find nothing in the act indicating that the Legislature intended to do away with the civil service rules, nor that the seniority rights created by such rule should give way to the preference rights given by the act. Both are created by legislative authority, and as both can stand together and be given a fair and reasonable operation, effect must be given to both. The civil service rules provide, in effect, that the several positions in question, instead of standing on a parity, shall take precedence in the order in which the holders of the positions were appointed. The Soldier's Preference Act provides that where, but for his military service, a soldier and other applicants or appointees would stand on a parity, the soldier shall take precedence. Reducing the force from sixteen to eleven, in effect, abolished five positions. By force of the civil service regulations, the positions so abolished were those held by the five operators last appointed. The relator was not one of these five and his position was not one of those abolished. By force of the Solder's Preference Act, the positions held by the soldiers could not be abolished so long as a position held by a non-soldier, appointed the same time or later, was continued. This accords to the soldiers the same preference right they had when they made their original applications, a right to be preferred over all others not in the service before they applied - but not a right to have old employees removed to make places for them.

Accord, Young v. City of Duluth, supra.

This analysis gives Crnkovich, supra, its full appropriate force. The
act was not meant to provide protection for sporadic, intermittent and occasional work assignments. When, however, the work is of a permanent character and, for a significant number of incumbents will be a full-time year-round position, the Veterans Preference Act provides a preference selection for winter work to the Employees, as outlined in State ex, rel Boyd v. Matson. supra. The veteran who was in the classification of Construction &

Maintenance Laborer has no right to retain his position after the end of the

construction season when there is no need for winter work. His summer duties terminate each year with the end of the construction season. He does, however, have a right of preference in the selection for placement on the winter work list as previously discussed, if one is established. It would consequently be manifest error to accept the contention of the City that the Veterans Preference Act should not be applied to its employees solely because they are labeled "seasonal" employees. Viewing the limited evidence in this record in the light most favorable to the Petitioners as the nonmoving parties, their positions appear to be better characterized as permanent jobs that are seasonally interrupted, meteorologically.

Veterans preference laws are remedial statutes that are to be liberally construed to accomplish their legislative purpose. It would defeat that purpose to allow political subdivisions to exempt their employees from the Preference Act by dividing jobs performed continuously into separate fixed term positions, subject to the political spoils system. The Iowa Supreme Court rejected a similar attempt in Kitterman v. Wapello County 145 Iowa 22, 123 N.H. 740:

> The fact that a soldier is employed to do work for the county creates no obligation upon the county to keep him upon its payroll when that work is done and there is no longer any need of his services; but when the service is one of an indefinite or continuous character, the reasonable necessities of which require the employment of someone at all times, and there is no statute designating or limiting the time for which appointment to such position may be made, we are not prepared to say that the board of supervisors can defeat the operation of the soldiers' preference act by the expedient of dividing the time into "terms" . . . . It is clear that the central purpose of the statute was to insure to the veteran permanency of employment, and make him so far as possible independent of the changing whims and interests of the officer or board under which he serves. To hold otherwise, and say that the supervisors may fix the term beyond which they are under no obligation to keep the soldier appointee in a service the nature of which is continuous, is to convert the position into a political asset of the successful party at each recurring election. We think therefore that if we are to give effect to the statute according to its obvious purpose and intent we must hold that the appointment of a veteran to a public service or employment of a continuous character for which no terms are fixed by statute must be treated as continuous, and that he may not be removed therefrom except in the manner which the act provides.

The City also argues that if the Employees had veterans rights, they were waived by failure to request a hearing within sixty days of the date of

receipt of the notice issued on October 2, 1992. The sixty-day period prescribed in the statute does not begin to run until the employee has received a specific notice of his rights as required by the statute. Minn. Stat. <RXQJ Y &LW\ RI 'XOXWK 1 : G

The attached order adopts the argument of the Employees contained in Petitioners' Memorandum in Opposition to Motion to Dismiss, pp. 6-8. In rejecting the position stated by the City. For the notice to be effective to preclude the Petitioners from asserting their claims, specific notice of veterans rights would have had to be given In the work list issued at the end of November 1992. It was at that point that the Employees knew that they would not be assigned winter work. Until they were informed that they had not been assigned winter work they had no reason to bring a charge. The earlier notice given in October only advised them that their regular, seasonal employment was ending for the year and that they could request a hearing if they believed that some other reason was prompting the layoff. The City has never given the Employees notice that they had a right to dispute the assignment of winter work, as announced on the work list issued at the end of November. Under the caselaw, the City's failure to give an appropriate notification of rights tolled the sixty-day period for filing a claim. v. City of Duluth, supra; Pawelk v. Camden Township , 415 N.W.2d 47 (Minn. App. 1987). Accordingly, the request for relief made by the Employees is timely.

HLK, Jr.